eous. It was for the company to show that the purchase and sale of the vacant lots were not an adventure in the nature of trade and therefore the gains derived therefrom were not taxable. But if looking at the facts and surrounding circumstances the only reasonable conclusion that the Special Commissioners could arrive at was that the purchase and sale of the vacant lots was not a transaction amounting to an adventure in the nature of trade then there must be some evidence which militates against that conclusion before the court can intervene and disturb the conclusion of the Special Commissioners.

What we have here as found by the Special Commissioners in their majority decision is that the respondent, a family company engaged primarily in the business of renting, had acquired landed property and after an interval of time disposed of them and substituted them with some other property which are still giving rental income to the company. Looking at the surrounding circumstances of the transaction and in the absence of any evidence to indicate that the original purchase was solely for speculative purposes it is really quite difficult not to agree with the findings of the Special Commissioners in the majority decision. I am therefore of the view that the majority decision should be confirmed and the appeal should be dismissed with costs. Order accordingly.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

KULASINGAM v. RASAMMAH

[A.C.J. (Hashim A. Yeop Sani J.)
September 3, 4, October 14 & 31, 1980]
[Kuala Lumpur — Civil Appeal No. 20 of 1979]

Family Law — Maintenance — Maintenance of wife — Whether wife left matrimonial home with sufficient reason — Entitlement to maintenance — Quantum — Maintenance of child — Whether person over twenty years old entitled to maintenance — Arrears of maintenance — Costs — Subordinate Court Rules, 1950, O. XXXVII r. 1 — Age of Majority Act, 1971 — Married Women and Children (Maintenance) Ordinance, 1950.

In this case the respondent wife had applied for maintenance for herself and her daughter who was over twenty years old. The learned Magistrate found that the respondent had left the matrimonial home with sufficient reason and was therefore entitled to maintenance. He also gave maintenance for the daughter. He fixed the amount of maintenance at $350 but did not order payment of arrears or costs. The appellant appealed and the respondent cross-appealed on quantum, arrears and costs.

Held: (1) the learned Magistrate was correct in finding that the respondent had left the matrimonial home with sufficient reason and was therefore entitled to maintenance from her husband and that the appellant had neglected to maintain her;

(2) the Age of Majority Act, 1971 is applicable and therefore the daughter who was over 20 years old was not entitled to maintenance;

(3) there was no good reason to alter the amount awarded for maintenance by the learned Magistrate;

(4) the learned Magistrate was correct in not ordering payment of arrears of the award;

(5) the Magistrate had a discretion to award costs and as he had not properly exercised his discretion, costs would be awarded against the appellants.

Cases referred to:-

(1) *Yong May Inn* v. *Sia Kuan Seng* [1971] 1 M.L.J. 280.
(2) *Wellesley* v. *Duke of Beaufort* 30 E.R. 236.
(3) *National Assistance Board* v. *Wilkinson* [1952] 2 Q.B. 255, 258.
(4) *Thomasset* v. *Thomasset* [1894] P. 295, 299.
(5) *Gengler* v. *Gengler* [1976] 1 W.L.R. 275.
(6) *Gangagharan* v. *Sathiabhama* [1979] 2 M.L.J. 77.
(7) *Luscombe* v. *Luscombe* [1962] 1 W.L.R. 313.
(8) *Pilcher* v. *Pilcher* [1956] 1 W.L.R. 298.
(9) *Marimuthu* v. *Thirichitambalam* [1966] 1 M.L.J. 203.
(10) *Amand* v. *Home Secretary & Anor.* [1943] A.C. 147.
(11) *Chew Cheng Swee* v. *Chan Chye Neo* [1932] M.L.J. 5.
(12) *Kok Heng Chow* v. *Lay Mee Yin* [1948] M.L.J. 157.
(13) *Stewart* v. *Stewart* [1952] M.L.J. 211.
(14) *Yap Ki Swee* v. *Phua Thiam Lai* [1975] 1 M.L.J. 39.

CIVIL APPEAL

V.K. Palasuntharam for the appellant.

Mrs. Jegathesan for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani J.: As aptly described by the Magistrate against whose order the present appeal was instituted, this is indeed a maintenance suit with a difference. To my mind, the difference lies in the fact that contrary to the object of the Married Women and Children (Maintenance) Ordinance, 1950 which is simplicity and expeditious process, this particular maintenance suit has so far taken not less than seven years to come to the present stage.

The information for summons was taken out by the wife, Rasammah, on August 8, 1973. The maintenance suit was set down for hearing a number of times. In the meantime, an interim order for maintenance was obtained from the magistrate on May 25, 1974. Because of the successive transfers of three magistrates the case was *de novoed* three times. The present appeal is in fact from the order made at the end of the hearing before the fourth magistrate and which hearing took not less than seventeen days.

The facts relating to the unfortunate situation between the appellant and the respondent are briefly as follows. Kulasingam and Rasammah were married in the Klang Wesley Church on November 13, 1953. Apparently the respondent came from a good and respectable family. The appellant had all along up to the time of the trial been a chief clerk of a lawyer's firm. The marriage brought forth four daughters, namely, Roslyn, Ruth, Jane and Esther. On the date when the magistrate made the order of maintenance Esther was over twenty years old although she was still living with her mother. All the three elder sisters had by then been married and were living elsewhere.

The marital relationship between the appellant and the respondent appeared to be normal and uneventful until about the period 1971-1972 when their relationship became strained. According to the respondent this was due to the unreasonable conduct and greed of the appellant who wanted her to transfer to him her shares in the properties described in the agreement (page 269) which is the subject of another suit between the parties. The first property described therein, i.e., No. 48, Upper Kevil Road, Sentul, Kuala Lumpur, was the matrimonial home which the respon-

dent left on December 29, 1972. The second property described as No. 4, Jalan Chempedak, Sentul, has been rented out and the rentals have been collected by the appellant throughout the material period. The third property described in the agreement has by now been given away as dowry to Jane when she got married in 1972. According to evidence adduced on behalf of the respondent the appellant was interested in transferring all these properties to himself alone and his slogan in the family during the material period was said to be "Give me and leave me." All along before the magistrate it was the contention of the wife that his greed for the property was the source of friction and the cause of the unreasonable conduct of the husband.

The Magistrate found as a fact at page 183 of her judgment that there was "no love lost" between the parties and between the appellant and his daughters. This in fact is reflected clearly in the evidence recorded. What daughter would call the father "bastard old man"?

To enable the respondent to place herself as a wife entitled to receive maintenance under the provisions of the Married Women and Children (Maintenance) Ordinance, 1950 there must be sufficient reason for her to have refused to live with the husband. The magistrate found as a fact at page 187 that on the evidence adduced before her the respondent had sufficient reasons to refuse to live with the appellant. At page 183 of her judgment the magistrate stated that she found the evidence of the respondent (as applicant in the maintenance suit) amply corroborated by the evidence of the four daughters. Having observed the witnesses and having heard their evidence she also found as a fact that they were witnesses of truth and was of the view that the consistency of their evidence must have stemmed "not from prior collaboration but from intimate association" with the facts of the case. Looking at the evidence recorded I am inclined to agree with the finding of the Magistrate on this and that if comparison is made between the evidence adduced on behalf of the respondent with the evidence adduced on behalf of the appellant the version of the respondent would on the balance of probabilities seem to be nearer the truth.

The respondent came from a respectable and religious family and there is evidence that she herself was a deeply religious person. The cruel act of the appellant in regard to the "Milo incident" on May 17, 1972 must have happened as described by the respondent and not as described by the appellant or as narrated by the former servant whose credibility was doubtful. The general conduct of the appellant towards the respondent and the family as described in the testimonies of the respondent and her daughters was considered by the magistrate to have been proved by evidence. Looking closely at the evidence recorded without the benefit of seeing the witnesses I must say that the finding of the magistrate could not have been otherwise. For how could a person claim to be a normal loving father if he could make a daughter sign an undertaking to leave the parents' house after her marriage (page 243). The undertaking dated August 22, 1972 signed by the daughter, Jane, and her husband was said to have been given at the request of the appellant. It would also be difficult to believe that the respondent who came from a respectable and well-to-do family could have willingly and without sufficient reason or cause left the matrimonial home to spend her first night away with her youngest daughter in a strange unfurnished room arranged hurriedly by one of the daughters and according to the evidence they slept on the floor (page 99). The matrimonial house was in fact her own property with one-third share only with the husband. Looking at all the evidence in their proper perspective it would also not be unreasonable to consider the so-called offers of reconciliation by the appellant not to be genuine. The magistrate who heard and saw the witnesses found the offers of reconciliation not to be genuine and I do not think I am justified without those advantages to interfere with that finding.

I am therefore satisfied with the finding of the magistrate that the respondent had left the matrimonial home with sufficient reason and was therefore entitled to receive maintenance from her husband and that the appellant had neglected to maintain the respondent. I accordingly uphold the order of maintenance made against the appellant.

Before going into the question of quantum I would like first to deal with the point raised by the appellant that the maintenance order made in respect of Esther, the youngest daughter, was bad in law. Esther was born on July 4, 1958 — birth certificate at page 256. Therefore, on the date when the order was made in respect of Esther she was already over twenty years old. It is the contention of the appellant that she was then no longer a "child" within the meaning of section 3 of the Married Women and Children (Maintenance) Ordinance, 1950. According to section 3(1) of the Ordinance if any person neglects or refuses to maintain his wife or a *legitimate child of his which is unable to maintain itself* the court may make a maintenance order for the maintenance of the wife and the said child. Judging from the operative words italicised it would seem that the court must be satisfied that the child is a legitimate child *and* that it is not able to maintain itself. The question here is whether Esther was in fact a "child" on the date of the order.

The word "child" is not defined in the 1950 Ordinance. We are permitted to explore first the ordinary meaning. In the Shorter Oxford Dictionary, Third Edition, the term "childhood" is explained to mean "The state or stage of life of a child; the time during which one is a child; the time from birth to puberty." In ordinary concept a person is either a child or an adult. In legal concept a person is either a minor or a major. We have the Age of Majority Act, 1971 (Act 21) which provides that the age of majority shall be eighteen years and that every male and female person attaining that age shall be regarded to be of the age of majority. The saving section of that Act provides that the Act shall not however affect the capacity of any person in marriage, divorce, dower and adoption or in matters of religion and religious rites or where in any written law it is expressly provided to the contrary. The Married Women and Children (Maintenance) Ordinance, 1950 is silent on the meaning of "child" and it is my view that the Age

of Majority Act, 1971 should apply. There are no decided cases directly on this point. However, in *Yong May Inn* v. *Sia Kuan Seng*[1] the late Sharma J. although he was dealing with a different point did use the word "infant" when referring to the order compelling the father to maintain his child under the 1950 Ordinance following the English case cited before him, *Wellesley* v. *Duke of Beaufort*[2] where the words "infant" and "minors" were used.

In this regard it is also pertinent to note that in the U.K. Children Act, 1975 the definition of "child" reads "except where used to express a relationship, means a person who has not attained the age of eighteen."

What is the legal position at common law? A father is under no liability at civil law to maintain his children — see *National Assistance Board* v. *Wilkinson*[3] judgment of Lord Goddard C.J. at page 258. "I know of no case in which a father has been ordered by a Court of Equity to maintain his child" said Lindley L.J. in *Thomasset* v. *Thomasset*.[4]

The 1950 Ordinance should in my opinion be regarded as a *statutory* provision for the maintenance of legitimate children. Thus the construction that the statutory provision covers only children who have not yet attained the age of majority would seem to be the more correct construction.

The legislative thinking on this point would seem to be reflected in the legislation passed subsequent to the 1950 Ordinance, viz., the Divorce Ordinance, 1952 and the Law Reform (Marriage and Divorce) Act, 1976 where the term "child" was defined to mean a person under the age of eighteen years — see section 2 of the Divorce Ordinance, 1952 and section 87 of the Law Reform (Marriage and Divorce) Act, 1976.

All these would seem to fortify the view that the age of Majority Act, 1971 should be applied in determining whether a legitimate child is of such age as would be entitled to a maintenance order under the 1950 Ordinance. I would therefore allow the appeal against the maintenance order made against Esther, the youngest daughter of the appellant and quash the order. Having so ruled I need not go into the secondary question raised by the appellant that a father is under no legal obligation to educate his children and therefore cannot be compelled under the Ordinance to pay for the education of the childern.

Quantum: At page 188 of the record the Magistrate awarded a sum of $350 per month as maintenance to both the respondent and Esther which amount also "to include Esther's educational fees." This appears in the judgment. The amount was purported to be based on the principle of one-third of the husband's salary as propounded in *Gengler* v. *Gengler*.[5] At page 181 of the record it is recorded that the amount of $225 was awarded for the mother (respondent) and $125 for Esther, the daughter, for their "maintenance." This order was in fact made on November 29, 1978 before the judgment was written on June 25, 1979. I am drawing this distinction because it was also argued by the appellant that he was under no legal obligation as a father to educate his children and therefore cannot be compelled under the 1950 Ordinance to do so. In my view it is clear from the record in this case that when the Magistrate made the order on November 29, 1978 the order was specifically referred to as an order of maintenance. It was only subsequently in the judgment about nearly a year later that the Magistrate thought fit to include the reference also to educational expenses. In my view it is the first order that reflected the true intent.

It was the contention of the respondent in her cross appeal that the Magistrate failed to consider all the sources of income of the appellant in arriving at the figure $350. Only the salary ($920 per month) was considered. Looking at the record at page 188 I do not think the magistrate ignored the other sources of income of the appellant when making the assessment. There is a clear reference to exhibit R56 in the judgment. R56 (page 331) refers to average monthly expenses of the appellant except in respect of No. 4, Jalan Chempedak particulars of which appears at page 329-330 showing a profit of $90.67. In any case section 3(1) of the 1950 Ordinance only requires an amount "in proportion to the means of such person, as to the court seems reasonable." The Magistrate gave adequate grounds for arriving at the amount at page 188:—

> "The order is not improperly burdensome upon him nor would it result in him being left with a sum inadequate to meet his own financial commitment. In giving the wife and child only $350 I am also conscious of the fact that the standard of living for them will have to be lower for now the income will be expended to maintain 2 households in place of the former one where the household expenses were shared. At the same time it would certainly not reduce the Applicant's standard of living more than was inherent in the circumstances."

I cannot find any good reason to alter the amount awarded for the maintenance of the respondent. The respondent's contention that the amount does not take into consideration the present state of inflation is irrelevant in the appeal as application for variation may at any time be made under the 1950 Ordinance. The cross appeal on quantum is therefore dismissed.

Arrears: It was also argued on behalf of the respondent in her cross appeal that the Magistrate should have ordered arrears of the award. The Magistrate's main reason for not awarding arrears seems to be that there was in existence an interim order which was made on May 25, 1974 and also that up to the date of the decision the appellant had been paying the sum ordered regularly. Another reason which I think supports the Magistrate's discretion not to backdate the order for maintenance is the principle that an award under the 1950 Ordinance should be construed as a fund for maintenance and not as property — see also *Gangagharan* v. *Sathiabhama*.[6] It is on this rationale that in *Luscombe* v. *Luscombe*[7] the practice of not enforcing arrears of maintenance for more than one year started by *Pilcher* v. *Pilcher*[8] was approved. The cross appeal on arrears is therefore dismissed.

Costs: Finally the question of costs. The Magistrate here followed the old practice which regards a maintenance proceeding as quasi-criminal. The Magistrate in her judgment gave her reasons for not awarding costs to the applicant at page 189 of the record. *Inter alia,* the grounds are that a maintenance order was "an order pronounced in a criminal case or matter"

and that the appeal was brought under section 307 of the Criminal Procedure Code.

To say that a maintenance proceeding is "criminal" or "quasi-criminal" in nature is actually a misnomer. As I said very early in this judgment the object of the 1950 Ordinance is expeditious disposal of the suit with a minimum of formalities. Section 10, aimed at this primary object reads:

"10. All applications to a court under this Ordinance shall be made and heard substantially in the same manner and in accordance with the same procedure as applications under any of the provisions of the Enactments set out in the Schedule hereto were made and heard by such court immediately before the commencement of his Ordinance."

Much water has however flowed under the bridge since 1950. Although the preamble to the Subordinate Courts Rules, 1950 states that the Rules shall apply "to all proceedings of a civil nature" commenced in the subordinate courts paragraph (14A) of the Second Schedule speaks of "maintenance orders". The new paragraph (14A) inserted in the Second Schedule by the Subordinate Courts (Amendment) Rules, 1960 (L.H. 139/1960) reads after its amendment again in 1970 by P.U.(A) 194/1970:—

"(14A). In any action relating to maintenance orders in respect of married women and children, the above costs shall be assessed on an amount equivalent to twelve times the amount of the monthly order for maintenance or where no order has been made such amount as may be fixed by the court."

The discretion of the court to award costs is given by Order XXXVII rule 1 of Subordinate Courts Rules.

The practice generally followed is reflected in the judgment of Gill J. (as he then was) in *Marimuthu* v. *Thirichitambalam*[9] where at page 204 he said:

"On a question being raised at the close of the appellant's evidence as to whether the proceeding before the court was criminal or civil, the learned magistrate held that the proceeding should follow the Criminal Procedure Code. This he apparently did because of provisions of section 10 of the Ordinance."

Then the learned judge proceeded to deal with the question.

"On the grounds raised in support of this appeal the first question which I have to decide is whether a maintenance proceeding by a wife against her husband under section 3 of the Married women and Children (Maintenance) Ordinance, 1950 (hereinafter called 'the Ordinance') is a criminal or a civil cause or matter.

In the case of *Amand* v. *Home Secretary and Minister of Defence of Royal Netherlands Government*[10] the House of Lords held that the test as to whether a proceeding was a criminal cause or matter depended upon the nature and character of the proceeding; if the matter was one of the direct outcome of which might be the trial of the person charged and his possible punishment for an alleged offence, the matter was criminal.

It is to be observed that the Ordinance under which the application for maintenance is made does not make the failure to maintain the wife and children punishable. The person against whom the application is made under the Ordinance is not charged with the commission of an offence, and he is not proceeded against as an accused person. It therefore follows that any proceeding under the Ordinance up to the stage at which an order for a monthly allowance is granted or refused is not of a criminal nature, nor can the hearing of an application for any variation of an order previously made be said to be in the nature of a criminal proceeding, although later proceedings for the enforcement of the order may be said to be criminal in view of the fact that the court may either levy or sentence the defaulter to a term of imprisonment for disobedience of the court's order."

Gill J. concluded that the relief under the 1950 Ordinance is "civil in nature" citing *Chew Cheng Swee* v. *Chan Chye Neo*[11] and *Kok Heng Chow* v. *Lay Mee Yin*[12] which were adopted by *Stewart* v. *Stewart*.[13]

Then Gill J. dealt at page 205 with the "criminal" character of a maintenance proceeding:

"The criminal process applied to these proceedings by virtue of section 10 of the ordinance is applied for the purpose of summary and speedy disposal of the matter in the interests of society. This process, in my opinion, cannot detract from the nature and character of the proceeding which, in my opinion, and on the authorities I have cited, is a civil cause or matter. Section 10 speaks of the application being 'made and heard" and not 'determined' in accordance with the provisions of the Criminal Procedure Code. The learned magistrate should have therefore asked the defendant/respondent's counsel to elect whether or not he would call any evidence before he could submit that there was no case to answer."

Therefore, a maintenance proceeding may be "quasi-criminal" in the initial stage and in the enforcement stage but the suit proceeds in almost every other way as a civil proceeding — see also the views of Syed Othman J. (as he then was) on section 4 and section 10 of the 1950 Ordinance in *Yap Ki Swee* v. *Phua Thiam Lai*.[14]

The awarding of costs is in the discretion of the court. In every civil proceeding the successful party is ordinarily awarded costs. So why not in maintenance proceedings in appropriate cases. In short, a successful claimant in a maintenance suit should not be deprived of her costs merely because it is a maintenance proceeding.

In this case the magistrate had the discretion to award costs but the discretion was in my opinion not properly exercised as the grounds given for refusing costs were not quite correct. I therefore allow the cross appeal on costs.

My orders in this appeal are as follows:—

(a) The appeal against the order of maintenance made in respect of the respondent is dismissed.

(b) The appeal against the order of maintenance made in respect of Esther, the daughter of the respondent, is allowed.

(c) The cross appeal on quantum is dismissed.

(d) The cross appeal on arrears is dismissed.

(e) The cross appeal on costs is allowed. Costs shall be paid to the applicant in the court below in accordance with paragraph (14A) of the Second Schedule to the Subordinate Courts Rules, 1950. I however make no order as to costs in the appeal.

Dated this 31st day of October, 1980.

Order accordingly.

Solicitors: *V.K. Palasuntharam; Jegathesan & Co.*